

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PIOCHE MINES CONSOLIDATED, INC.
and ELY VALLEY MINES, INC.,

Petitioners,

vs.

THE HONORABLE ROGER T. FOLEY,
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEVADA,

Respondent.

NO. 22,700

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Petitioners' Reply Brief

FILED

OCT 11 1968

WM. B. LUCK, CLERK

JOHNSON & STEFFEN
112 North Third Street
Las Vegas, Nevada 89101

Attorneys for Petitioners

TABLE OF CONTENTS

I.

The Respondent Court further errs in arrogating to itself the discretion to both remove or refuse to recognize Petitioners' officers and directors and to withhold corporate properties until satisfied said officers and directors will handle corporate properties in a manner consistent with the Respondent Court's predilection..... 1

II.

Respondent's discretion to further withhold the return of Petitioners' records and properties pursuant to the mandate of this Court in Ely Valley Mines, Inc. v. Lee, 385 F. 2d 188 was, by his own admission, exhausted..... 2

III.

Petitioners are compelled to correct the record as to certain false assertions set forth in Respondent's Brief in Opposition to Petition for Writ of Mandamus and Prohibition..... 6

IV.

Respondent errs in assuming that a corporation, under Nevada law, remains a corporate entity in spite of having no officers or directors... 9

Conclusion..... 11

Receipt of Copy.....

Affidavit of Service.....

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TABLE OF AUTHORITIES CITED

Cases

Page

Ely Valley Mines, Inc. v. Lee

385 F. 2d 188.....

2, 3, 4, 5,
11

Pioche Mines Consolidated, Inc. v. Dolman

333 F. 2d 257, Cert. denied, 380 U.S.
956, 85 S. Ct. 1081, 13 L. Ed 2d 972.....

4, 11

Statutes

Nevada Revised Statutes (NRS):

78.340.....

9

78.150 (1).....

10

78.175.....

10

1 NO. 22,700

2 IN THE
3 UNITED STATES COURT OF APPEALS
4 FOR THE NINTH CIRCUIT

5
6 PIOCHE MINES CONSOLIDATED, INC., and ELY VALLEY MINES,
7 INC.,

Petitioners,

8 vs.

9 THE HONORABLE ROGER T. FOLEY, JUDGE OF THE UNITED
10 STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

11 Respondent.

12 Petition for Writ of Mandamus and Prohibition

13
14 PETITIONER'S REPLY BRIEF

15
16 In reply to Respondent's Brief In Opposition To Petition For
17 A Writ of Mandamus and Prohibition, Petitioners submit the following:

18 I.

19 THE RESPONDENT COURT FURTHER ERRS IN ARROGATING TO
20 ITSELF THE DISCRETION TO BOTH REMOVE OR REFUSE TO
21 RECOGNIZE PETITIONERS' OFFICERS AND DIRECTORS AND TO
22 WITHHOLD CORPORATE PROPERTIES UNTIL SATISFIED SAID
23 OFFICERS AND DIRECTORS WILL HANDLE CORPORATE PROPER-
24 TIES IN A MANNER CONSISTENT WITH THE RESPONDENT COURT'S
25 PREDILECTION.

Respondent characterizes the primary issue as being whether

1 the Respondent Court has abused its discretion in

2 "refusing to return assets to each corp-
3 oration until it is assured that the corp-
4 orations have appropriate officers to
5 whom the assets of the corporation may
6 be returned and who will utilize the same
7 for the benefit of the stockholders who
8 are the owners of each corporation."

9 In calling the Court's attention to use of the conjunctive "and" in the
10 aforesaid quote, it is clear that Respondent now takes the position
11 that the lower court may, as a condition precedent to the return of
12 Petitioners' records and properties, both adjudicate the validity of
13 Petitioners' officers and directors and then require assurance that
14 such officers and directors will utilize said properties and records
15 in a certain manner. This is tantamount to an expropriation of
16 corporate government and management by Respondent.

17 It is respectfully submitted that under the circumstances of
18 the instant case, Respondent has abused his discretion in refusing
19 to return Petitioners' properties and records pending an attempted
20 adjudication of the validity of Petitioners' officers and directors and
21 the propriety of their intentions regarding the use of Petitioners'
22 properties and records.

23 II.

24 **RESPONDENT'S DISCRETION TO FURTHER WITHHOLD THE RETURN**
25 **OF PETITIONERS' RECORDS AND PROPERTIES PURSUANT TO THE**
MANDATE OF THIS COURT IN ELY VALLEY MINES, INC. v. LEE,

1 385 F. 2d 188 WAS, BY HIS OWN ADMISSION, EXHAUSTED.

2 It is true that this Court, in its decision of Ely Valley Mines,
3 Inc. v. Lee, supra, declared:

4 "The properties and records should be
5 surrendered forthwith, unless the court
6 determines, promptly, that there is a
7 good reason for not doing so. As we have
8 pointed out, the fact that Janney is still
9 the president of each corporation is not
10 such a reason." (emphasis added)

11 Respondent's current position (as articulated by counsel for Plaintiff
12 Helen Dolman and Receiver Americo Campini) purports to find sup-
13 port in the above quoted portion of this Court's opinion in the afore-
14 said decision. It is submitted, however, that Respondent has admit-
15 ted that the only remaining impediment to the prompt return of
16 Petitioners' properties and records is the judicial determination of
17 proper corporate officers and directors to receive them. In the words
18 of the Respondent:

19 "The Board of Directors are authorized,
20 and the only ones authorized to elect the
21 officers. I want to turn this property back
22 right now to the proper custodians and rep-
23 resentatives of these corporations, but I
24 don't know who they are." Tr. B-26:5-9
25 (emphasis added)

1 Respondent thus made the only obstacle to the return of the properties
2 a determination by the lower court as to the validity of Petitioners'
3 officers and directors -- an "issue" beyond the jurisdiction of the
4 Respondent Court! Respondent is estopped to deny the foregoing
5 premise.

6 Respondent contends that it is now within his discretion to
7 allow the wrongfully appointed receiver to continue his six plus years
8 of wrongful possession of Petitioners' properties and records on the
9 basis that Petitioners have no valid officers and directors and that
10 the "pretenders" to such offices are engaging in or intending to engage
11 in conduct which is adverse to the stockholders. Petitioners deem it
12 unnecessary to further burden this Court with reasons why Respondent
13 is without discretion or jurisdiction to adjudicate or re-litigate the
14 legal status of Petitioners' officers and directors. Petitioners merely
15 re-assert the clarity of this Court's opinions in both Ely Valley Mines,
16 Inc. v. Lee, supra, and Pioche Mines Consolidated, Inc. v. Dolman,
17 333 F. 2d 257, cert. den., 380 U.S. 956, 85 S. Ct. 1081, 13 L. ed.
18 2d 972. In combination, the two cases hold that Petitioners' officers
19 and directors have not been outlawed or removed and that the case in
20 chief (No. 311 below) is not a proper action for providing such relief.

21 Respondent seeks to justify his intrusion into the aforesaid
22 area where jurisdiction is lacking by referring to extraneous attempt-
23 ed wrongs on the part of Petitioners officers and directors. It is to
24 be noted first that even assuming, arguendo, that Petitioners' officers
25 and directors were dedicated to a course of action inimical to the

1 interests of the stockholders, this fact alone would hardly justify
2 Respondent's attempt to defrock said officers and directors. This
3 premise is sustained and emphasized by the fact that prior to this
4 Court's decision in Ely Valley Mines, Inc. v. Lee, supra, the Court
5 was virtually inundated with the alleged wrongdoings and mismanage-
6 ment of the late John Janney and in spite thereof, held that Janney
7 had not been outlawed or removed from office and that Respondent
8 could not withhold the immediate return of Petitioners' properties
9 and records because of the fact that Janney was still president of each
10 corporation.

11 Secondly, since Petitioners do not deem it proper or necessary
12 to pursue such alleged and diversionary "wrongs" as the intended com-
13 promise of the one million dollar judgment against Janney -- such
14 alleged wrongs being outside the scope of the issues before this
15 Court -- Petitioners will primarily beg this Court's indulgence and
16 deny that their officers or directors have taken any action or course
17 of conduct deemed detrimental to the stockholders. If this Honorable
18 Court desires to inquire into the matter further during oral argument,
19 Petitioners' counsel shall be most willing to answer any questions this
20 Court may have. Petitioners know of no rule of law or equity that will
21 cause an automatic loss of authority or office on the part of corporate
22 officers and directors merely because of alleged wrongdoing. Such a
23 result would be a clear deprivation of due process. Respondent
24 nevertheless seeks to do just that; he has attempted to use an action
25 which has sought no relief against these petitioning corporations in

1 such a manner as to devitalize or defrock Petitioners' officers and
2 directors and leave them powerless to act. Such conduct on the part
3 of the Respondent Court is especially incredulous and astounding in
4 respect of the Petitioner Ely Valley Mines, Inc. since it has been
5 dismissed out of the action below. It is thus clear, from a practical
6 and realistic standpoint, that said dismissal is a paper mirage, for
7 the Petitioner Ely Valley Mines, Inc. remains a beleaguered defen-
8 dant in No. 311 below, forced to continue a costly course of litigation
9 in order to "walk out" of the lower court without leaving its records,
10 properties and indeed its officers and directors, behind.

11 III.

12 **PETITIONERS ARE COMPELLED TO CORRECT THE RECORD AS TO**
13 **CERTAIN FALSE ASSERTIONS SET FORTH IN RESPONDENT'S BRIEF**
14 **IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS AND**
15 **PROHIBITION.**

16 Respondent would have this Court believe that:

17 "the evidence presented to the Respondent
18 Court by the petitioning corporations dis-
19 closes that there were no meetings of the
20 Board of Directors from 1954 (see Exhibit
21 G to the petition on file herein) until a pur-
22 ported meeting of a Board of Directors held
23 at the Parker House Hotel in Boston, Massa-
24 chusetts on October 4, 1967, an intervening
25 period of more than thirteen (13) years."

(See p. 7 of Respondent's Brief In Oppos-
ition)



1 Respondent then justifies his finding as to no valid boards of directors
2 on the above false premise as follows:

3 "Based upon this disclosure and being com-
4 petently aware of the manner in which these
5 corporations were mismanaged by John Janney
6 during his tenure of office in which he pur-
7 ported to operate each corporation as a sole
8 proprietorship contrary to the best interests
9 of the stockholders, the Respondent Court has
10 repeatedly and does now adhere to the posi-
11 tion that there are no proper directors of
12 either corporation. . . ." (See pp. 7-8 of
13 Respondent's Brief In Opposition)

14 (Emphasis added)

15 First, it is important to note that the assertion as to the
16 thirteen (13) year interval between directors' meetings is patently
17 false. Respondent erroneously cites, in support of his contention,
18 Exhibit G to the petition on file herein. Respondent clearly intended
19 to cite Exhibit H to the petition on file herein, which Exhibit is entitled
20 "Defendants' Reply Memorandum To Plaintiffs' And Receiver's
21 Memorandum In Opposition To Motion For Return Of Corporate
22 Properties." Attached to the aforesaid Reply Memorandum (Exhibit H)
23 were sample minutes consisting of exhibits G through M. These sampl
24 minutes were furnished Respondent Court in order to disprove an
25 earlier false assertion by Plaintiffs' and Receiver's counsel to the



1 effect that there had "never been a meeting of the Board of Directors
2 at one place or one time." However, in order to make it clear that
3 said minutes did not purport to represent the total of such meetings
4 over the periods involved, Petitioners' said Exhibit H Reply Memorandum
5 stated as follows:

6 'Attached hereto as Exhibits G, H, I,
7 J, K, L and M are copies of a series of
8 sample meetings of the Boards of Directors
9 dating from 1954 to the present.
10 These minutes do not, in any sense,
11 represent the total of such meetings."

12 (See p. 9 of Exhibit H to the instant
13 Petition)

14 Petitioners here reassert the falsity of Respondent's position as to
15 directors' meetings, and stand ready to prove same if this Court
16 should so request.

17 Respondent's position as to the basis for "repeatedly" adhering
18 to his position that Petitioners have no valid officers or directors is
19 thus pinned to (1) a patently false premise as heretofore indicated;
20 and (2) a persistent disregard of this Court's mandate as to the legal
21 status and entitlement of the late John Janney as president of each of
22 the petitioning corporations.

23 In passing, it should be noted that Respondent repeats the false
24 assertion concerning the thirteen (13) year interval between directors'
25 meetings on pages 10 and 20 (in the latter case the alleged interval

1 jumps to twenty-three (23) years) of Respondent's Brief In Opposition.

2 Attention is also drawn to false assertions on page 21 of
3 Respondent's Brief In Opposition which, contrary to the evidence on
4 record, indicates that there was never any election of directors by
5 the stockholders and that the late John Janney refused to hold directors
6 meetings. In the same vein, Respondent falsely asserts, on page 23
7 of said Brief, that "no one of the individuals presently contending that
8 they are directors of either corporation has been elected by the stock-
9 holders." In reply to these assertions, Petitioners shall merely refer
10 to pages 8 and 9 of Exhibit H to the petition on file herein and note that
11 Petitioners filed in open court a sworn affidavit of one Francis G. Shaw
12 director and secretary of the petitioning corporations, attesting to his
13 election as a director of Ely Valley Mines, Inc., at a stockholders'
14 meeting. (See Tr. N-5: 14-25; 6: 1-16)

15 Parenthetically, Petitioners desire to re-emphasize that they
16 disavow any endeavor to show disrespect for the lower court and
17 specifically Respondent, the Honorable Roger T. Foley, Judge of the
18 United States District Court for the District of Nevada. Nothing said
19 herein is intended to show disrespect for the said Respondent.

20 IV.

21 **RESPONDENT ERRS IN ASSUMING THAT A CORPORATION, UNDER**
22 **NEVADA LAW, REMAINS A CORPORATE ENTITY IN SPITE OF**
HAVING NO OFFICERS OR DIRECTORS.

23 On page 9 of Respondent's Brief in Opposition, Respondent
24 refers to Nevada's hold-over statute (NRS 78.340) previously cited
25 by Petitioners in their Opening Brief, and then merely avoids its clear



1 import by stating it cannot be divorced and read independently of the
2 other statutory provisions relating to private corporations, and con-
3 cludes that:

4 "The corporation remains as a corporate
5 entity but it is apparent that there are no
6 validly elected directors or officers to whom
7 the assets may properly be delivered."

8 Under the terms of NRS 78.150 (1) an annual list of officers, directors
9 and resident agent must be certified by a president, secretary or other
10 corporate officer and filed with the Secretary of State along with a
11 filing fee. If this is not done within a specified time, then under the
12 terms of NRS 78.175 the defaulting corporation will have its charter
13 revoked. It is to be emphasized, therefore, that if Petitioners' offi-
14 cers and directors had not complied with the requirements of NRS
15 78.150 (1), as noted above, since 1962 when Respondent first held
16 that Petitioners had no valid directors or officers, their respective
17 charters would have been revoked thus terminating the corporate
18 entity. Under Nevada law, as cited above, only a corporate officer
19 may file the required annual list, and hence, no officers, no list; and
20 if there are no officers and no annual list, the end result becomes no
21 corporate entity by virtue of the revocation of the corporation charter.

22 In conjunction with Petitioners' position under this point of
23 reply, and to the extent allowed by this Court, Petitioners aver that
24 never have their officers and directors assumed and maintained their
25 respective positions by force; they have functioned consistently and

1 continuously to supply necessary corporate government and manage-
2 ment. They have constantly seen that corporate properties were
3 preserved by providing necessary assessment work and taxes in spite
4 of a complete lack of income or productivity because of vexing litiga-
5 tion. They have also taken all necessary measures to preserve
6 Petitioners' good standing as corporations in the state of Nevada.
7 Petitioners' officers and directors have never had any other group
8 represent or hold themselves out to be competitor officers and dir-
9 ectors.

10 Petitioners deem it unnecessary to reply to Respondent's
11 contention that Petitioners' officers and directors do not even have
12 a colorable claim or title to office. The facts speak out to the contrary

13 CONCLUSION

14 Petitioners have not sought to increase the proliferation of
15 paper work in this proceeding by replying to each contention set forth
16 in Respondent's Brief In Opposition. With due respect, it is earnestly
17 asserted that none of the points raised by Respondent are of merit in
18 the instant proceeding. Petitioners respectfully submit that the Re-
19 spondent Court is no longer lawfully or equitably entitled to further
20 defer compliance with the mandates of this Honorable Court as per
21 Ely Valley Mines, Inc. v. Lee, supra, and Pioche Mines Consolidated,
22 Inc. v. Dolman, supra. It is respectfully urged that the Respondent
23 Court be allowed no further discretion in the premises, and that the
24 writs issue from this Honorable Court as heretofore prayed.
25

1 Dated October 10, 1968.

2 Respectfully submitted,

3 JOHNSON & STEFFEN

4
5 BY 

6 THOMAS L. STEFFEN
7 Counsel for Petitioners
8 112 North Third Street
9 Las Vegas, Nevada

10 RECEIPT OF TWO COPIES of the above and foregoing
11 PETITIONERS' REPLY BRIEF is hereby acknowledged this
12 _____ day of October, 1968.

13 SAMUEL C. SHENK

14 SINGLETON, DELANOY, JEMISON
15 & REID, Chartered

16 BY _____

17 Counsel for Respondents
18 302 East Carson
19 Las Vegas, Nevada
20
21
22
23
24
25



1 IN THE UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT

3 ---o0o---

4 PIOCHE MINES CONSOLIDATED, INC.,
5 and ELY VALLEY MINES, INC.,

6 Petitioners,

7 vs.

8 THE HONORABLE ROGER T. FOLEY,
9 JUDGE OF THE UNITES STATES
10 DISTRICT COURT FOR THE DISTRICT
OF NEVADA,

Respondent.

11 AFFIDAVIT OF SERVICE

12 STATE OF NEVADA }
13 COUNTY OF CLARK } ss:

14 TERRY V. MARSDEN, being first duly sworn, desposes and
15 says:

16 That on the 10th day of October, 1968, she delivered a copy
17 of Petitioners' Reply Brief to The Honorable ROGER T. FOLEY, at
18 his office in the United States District Court, Federal Building, Las
Vegas Boulevard South, Las Vegas, Nevada.

19 DATED this 10th day of October, 1968.

20
21 *Terry V. Marsden*
Terry V. Marsden

22 SUBSCRIBED AND SWORN to
23 before me this 10th day of October, 1968.

24 *Charles William Johnson*
Notary Public



25 Notary Public - State of Nevada
CLARK COUNTY
Charles William Johnson
My Commission Expires Sept. 2, 1972

